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In the

Supreme Court of the United States

OCTOBER TERM, 1956

No. [redacted] 840

THE SECOND NATIONAL BANK OF NEW HAVEN, EXECUTOR OF THE WILL OF FREDERICK F. BREWSTER, LATE OF HAMDEN, DECEASED,

Petitioner

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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vs.

UNITED STATES OF AMERICA,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in the above case.

OPINIONS BELOW

The opinion of the District Court for the District of Connecticut is reported at 222 F. Supp. 446 and is also printed in the record (pp. 87a-111a).

The opinion of the Court of Appeals for the Second Circuit is reported at 351 F.2d 489 and is also printed in the record at pages 121a-132a and in annexed appendix. (pp. 2a-14a)

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was made and entered on September 28, 1965. (App. p. 15a) The petition of The Second National Bank of New Haven as Executor aforesaid for a rehearing (R. p. 135a) and its suggestion for rehearing in banc were denied on March 21, 1966. (R. pp. 153a, 157a) The jurisdiction of this court is invoked under 28 U.S.C. Section 1254(1).

QUESTIONS PRESENTED

Connecticut statutes prescribe that federal and Connecticut estate taxes paid by a decedent's estate are to be equitably prorated among the persons interested in it, *i.e.* donees of taxable inter vivos transfers, pecuniary and specific legatees and recipients of the residue. If a particular gift does not generate any estate taxes because of the marital deduction or its charitable character, no estate taxes can be prorated against it. The statute applies to every estate paying such taxes, unless the testator in his will has clearly and unambiguously directed otherwise.

In proration proceedings in this decedent's estate, the Probate Court ruled that for lack of a clear and unambiguous direction to the contrary, estate taxes generated by the residue should be apportioned between residuary gifts and that hence the widow's one-third share of the residue, which qualified

for the marital deduction and tax exemption should have no estate taxes charged against it. The present case seeks a refund of federal estate taxes.

The two questions presented are:

(1) Whether estate taxes should be prorated as between the residuary shares because the testator failed, under the standards established by the Supreme Court of Connecticut, to clearly and unambiguously direct otherwise?

(2) Whether the decree of the Probate Court determining that the Connecticut proration statute was applicable to the residuary estate and that estate taxes must therefore be prorated between the residuary shares was conclusive in assessing federal estate taxes?

STATUTES INVOLVED

The pertinent portions of the Internal Revenue Code of 1954, Section 2056 (26 U.S.C. 1958 ed. Sec. 2056) and Chapter 218 of the General Statutes of Connecticut, Section 12-400, Section 12-405 entitled *Proration of Federal and State Estate Taxes* (General Statutes of Connecticut, Volume II, Revision of 1958, as amended) are set forth in the annexed appendix. (pp. 19a-22a)

STATEMENT OF THE CASE

Petitioner is the sole executor of the will of Frederick F. Brewster, a resident of Connecticut, who died on September 16, 1958. The decedent's will and a codicil thereto were admitted to probate by the Probate Court for the District of

Hamden, Connecticut, on October 6, 1958. The will was originally executed on June 5, 1958. Article One provided:

> "ONE: I direct my executors hereinafter named to pay out of my estate my just debts and funeral expenses and any death taxes which may be legally assessed upon or with respect to any property which is required to be included in my gross estate under the provisions of any death tax law. The provisions of any statute requiring the apportionment or proration of such taxes among the beneficiaries of this will or the transferees of such property, or the ultimate payment of such taxes by them, shall be without effect in the settlement of my estate."

The remainder of the will provided certain pecuniary or specific bequests to his wife and others and left the residue in trust. In Article Nine of the will the testator stipulated that one-third of the residue was to be held in trust during the life of his wife, Margaret F. Brewster, and the income paid to her. Upon her death the trust was to terminate, and the corpus was to be paid in equal shares to three children, or their issue. The other two-thirds of the residue was to be held in trust for the benefit of all the decedent's grandchildren living upon his death. (R. pp. 14a-25a)

On July 1, 1958, within a month of the execution of his original will, the decedent executed a codicil thereto by which he altered the provisions of his original will in two respects. (R. pp. 27a-29a) First, he amended Article Two of the will in which he had provided that certain expenses that might arise in connection with certain charitable gifts were to be paid from the principal of the widow's trust. (R. p. 16a) The codicil deleted the provisions for payment from the widow's trust and instead created a separate trust with the income and principal to be used to meet such expenses. The second alteration in the will related to the widow's trust. The decedent specified that in addition to the income of the trust for life,

his wife was to receive a general testamentary power of appointment over the corpus of the trust (i.e., one-third of the residue). In default of appointment, the corpus of the trust was to be paid over, as provided in the original will, to three of his children, or their issue. By this change, the decedent qualified the widow's trust for the marital deduction provided by Section 2056 of the Internal Revenue Code of 1954 and tax exemption. The testator stated in the codicil that "In all other respects I hereby republish and confirm my said will." (R. pp. 27a-29a)

On December 16, 1958, the petitioner and another executor, who later resigned, filed a federal estate tax return reporting an estate tax liability of $4,028,613.85 based upon a gross estate of $13,201,347.90 and a taxable estate of $8,392,892.80. (R. pp. 87a-88a) The return claimed as part of the marital deduction the corpus of the widow's residuary trust. This was computed as one-third of the residue before the payment of estate taxes attributable to residuary properties. In essence the widow's allowance, the pre-residuary legacies and taxes thereon, the debts and administration expenses were deducted from the total probate estate. One-third of the remainder was allocated to the widow's trust which was then reduced by the state succession taxes levied against it. (R. p. 61a)

On October 18, 1961, following an audit of the estate tax return, the District Director of Internal Revenue forwarded to the executors a so-called "30-day letter"[1] showing a defi-

[1] Such a letter is an intermediate step preceding the issuance of a "90-day letter" or statutory notice of deficiency. The letter informs the taxpayer of certain rights of appeal within the Internal Revenue Service. The function of a 30-day letter is described in Section 601.105(d) of Statement of Procedural Rules (Internal Revenue Service) (26 C.F.R., Sec. 601.105 (d)).

ciency due in the amount of $1,336,468.40. This deficiency resulted principally from two determinations made by the District Director: the disallowance of the widow's allowance as part of the marital deduciton and the reduction of the marital deduction for the widow's trust from $3,630,243.95 to $1,682,-846.59. The latter adjustment was based on the District Director's determination that estate taxes should not be prorated between residuary gifts and that the widow's trust should receive one-third of the residuary estate computed after the payment of all federal and state death taxes, including the estate taxes generated by the residuary properties. (R. pp. 67, 69, 71, 88-89)

Upon filing the federal estate tax return in December, 1959, the executors had paid the estate tax reported due, *i.e.* $4,-028,613.85. (R. pp. 54a, 55a, 59a) On November 10, 1961 the executors filed an application in the Probate Court to determine the proration of the federal estate taxes paid. Since all such taxes attributable to non-residuary gifts were recognized as payable out of the residue by express direction of the testator, proration was possible only with respect to residuary shares. (R. pp. 31a-42a) The total federal estate tax attributable to the residuary properties and subject to proration was $3,832,550.45.

Notice of the application and hearing thereon was given, inter alia, to the decedent's widow, two adult grandchildren, beneficiaries of residuary trusts, the guardian-ad-litem for the seven minor grandchildren also beneficiaries of residuary trusts, and the District Director of Internal Revenue at Hartford. (R. pp. 38-39, 78, 79, 80, 89) The District Director was also furnished with a copy of the executor's application and computation of the proposed proration they deemed necessary.

The guardian-ad-litem, an attorney-at-law, filed his report under oath stating that there were no legal objections to the proration of the federal estate tax as set forth in such application and in his letter transmitting the report to the Judge of Probate, he stated the grounds for his opinion. (R. pp. 75a-78a)

Neither of the adult grandchildren nor the District Director of Internal Revenue appeared at the hearing or made their positions known to the Probate Court. Subsequent to the hearing and on December 26, 1961 the Probate Court filed a memorandum of decision approving the executors' proposed proration and entered a decree in which it:

> "ORDERED, that the federal estate tax be prorated in the manner and in the amounts set forth in said application and that said Executors are authorized, empowered and directed to charge the prorated amounts against the persons against whom the tax is so prorated as set forth in said application."

(R. pp. 78a-81a)

Thereafter the Commissioner determined and assessed a deficiency in the amount of $1,333,194.35 tax plus $195,285.58 interest, ruling that the widow's allowance did not qualify for the marital deduction and finding that the amount of the marital trust was as stated in the 30-day letter. (R. pp. 48, 49) The plaintiff paid the deficiency and commenced this timely suit for refund in the amount of $1,600,000 plus interest in the United States District Court for the District of Connecticut. (R. pp. 12, 89)

On the executor's motion for summary judgment on the issue of liability in the district court (R. p. 90a) the latter held:

(1) That the widow's allowance did not qualify for the marital deduction. (In the Court of Appeals the executor con-

ceded its position on this issue so that it is not now involved in the case).

(2) That the testator had not clearly and unambiguously directed against the proration of estate taxes between residuary gifts and hence the Connecticut apportionment statute was applicable in that area.

(3) That the decree of the probate court relating to proration of estate taxes was not conclusive upon the federal government.

The United States then moved that, under the District Court's decision, judgment be entered against it in the amount of $1,295,208.01 plus interest. (R. p. 112) Plaintiff, however, moved for judgment in the amount of $1,485,293.86 plus interest. (R. pp. 113-115) After a hearing the District Court, without making further findings of fact, entered judgment against the United States for $1,485,293.86 plus interest as requested by the plaintiff. (R. pp. 115-117)

REASONS FOR GRANTING THE WRIT

The decision below should be reviewed because the Court of Appeals:

(a) has decided important state questions in a way in conflict with applicable state law;

(b) has decided a federal question in a way in conflict with applicable decisions of this Court;

(c) has rendered a decision in conflict with the decisions of other courts of appeals on the same matter.

ARGUMENT

In Support of Reason (a)

An apportionment statute modeled after that of New York was first enacted in Connecticut in 1945. In 1949 the Supreme Court of Connecticut first had occasion to consider this statute in *McLaughlin* vs. *Green,* 136 Conn. 138. Out of this case came the principle that apportionment pursuant to the statute is the rule to which exception is allowed only if there is a clear and unambiguous direction against it. Sometimes the word "specific" is used instead of "clear". The Connecticut Supreme Court drew this principle from *Matter of Mills,* 272 App. Div. 229, 233, 70 N.Y.S. 2d 746, quoting from the opinion in the latter case with approval. In subsequent decisions the principle became firmly established in Connecticut jurisprudence. See *Jerome* vs. *Jerome,* (1952), 139 Conn. 285, 93 A.2d 139; *New York Trust Co.* vs. *Doubleday,* (1956), 144 Conn. 134, 128 A.2d 192; *Guaranty Trust Co.* vs. *New York City Cancer Committee,* (1958), 145 Conn. 542, 144 A.2d 535; *Morgan Guaranty Trust Co.* vs. *Huntington,* (1962), 149 Conn. 331, 179 A.2d 604.

Also established in the last three of the decisions cited was the rule that a direction to pay taxes out of the residuary estate, such as is found in Mr. Brewster's will is not a sufficient direction against proration among residuary gifts. Thus in *New York Trust Co.* vs. *Doubleday, supra,* the court said at page 141:

> "• • • At first blush, this language might seem to be sufficiently broad and inclusive to cover gifts of the residue itself as well as those resulting from specific devises and legacies. Upon reflection, however, there arises some doubt that this was the testator's intention. Since a doubt

> exists, the tax clause lacks the clarity necessary to make the proration statute inoperative as to the residuary gifts. Whatever may have been his unexpressed intention, *the testator neglected to speak clearly upon the question of proration as it applies to the residuary gifts. The directive in the will that all estate taxes be paid from the residue is not a directive against the prorating of estate taxes among residuary gifts.*" (emphasis added)

Guaranty Trust Co. vs. *New York City Cancer Committee, supra,* and *Morgan Guaranty Trust Co.* vs. *Huntington, supra,* are to the same effect.

In the present case the problem relates not to estate taxes on inter vivos gifts or non-residuary legacies, all of which were clearly stated to be payable out of the residue, but only to apportionment of estate taxes among the residuary shares. The third of the residue given to the widow was made to qualify for the marital deduction and to become tax exempt by the codicil; the balance of the residue passed into several trusts for the decedent's grandchildren and remained taxable. If the widow's share was to be kept free of the burden of estate taxes, the will had to speak clearly and unambiguously not about the preresiduary gifts, but about the residuary gifts and the estate taxes generated by them. Clarity and specificity were necessary under the authorities cited.

To the guardian ad litem, the Probate Court and the District Court doubt about the testator's intent arose out of the phrase "beneficiaries of this will" found in the second sentence of Article One. (R. p. 140) The phrase obviously included all beneficiaries, residuary as well as non-residuary. Thus, literally the first sentence of Article One directed the payment of all death taxes out of the residue while the second sentence prohibited the payment of them by residuary beneficiaries.

That is what the words of the will said. The uncertainty thereby created about the decedent's intent led the guardian and the two courts mentioned to conclude that the direction about proration was not clear and unambiguous, and in conformity with the Connecticut decisions cited above, each decided that the proration statute must apply within the residue. The guardian's report and the probate court decision appear in the record at pages 75a-81a.

Further, when the will was made, the direction not to apply the proration statute was wholly inoperative within the residue. The residuary gifts were equally taxable and no reason existed for treating one differently than another. The taxes on them necessarily must be paid out of the residue and proration between them in proportion to the size of each gift was automatic. Article One was not necessary to accomplish this result. But upon the codicil being executed, rendering the widow's third tax exempt, the underlying condition was changed. A question arose whether by the codicil, the testator intended to enlarge the effect of Article One and thereby deny his widow the full benefit of the tax exemption he manifestly desired her to have, or whether Article One still remained ineffective in the residue.

In testing the legitmacy of these doubts the guardian and the probate and district court had the benefit of the thinking of the New York Court of Appeals in *Matter of Pepper*, (1954), 307 N.Y. 242, 120 N.E. 2d 807, a parallel case in which the court said that the "inherent contradiction" such as has been pointed out in Article One rendered the whole tax clause "meaningless." Unquestionably they believed the Supreme Court in Connecticut would follow this authority. The tenor of the decisions of the New York and Connecticut courts in this

field is the same.[2] The district court also had support from the New York Court of Appeals in another strikingly parallel case, *Matter of Shubert*, (1962), 10 N.Y. 2d 461, 180 N.E. 2d 13, which had not been decided when the Probate Court acted. There a codicil had altered certain residuary bequests to make them charitable and tax exempt and also republished the will without changing the tax clause. The same problem arose as in the instant case. The New York Court settled it by saying it did not perceive how a tax clause could be read as an express direction to accomplish something totally unnecessary when it was drafted.

Thus the doubts apparent to the guardian and the probate court and the district court were real and not far fetched. The Court of Appeals sought to avoid them by "construing" the will. Near the end of its decision, the Court epitomizes it as one "construing paragraph 'One' to direct that the proration laws of Connecticut do not apply." This aptly describes the opinion which contains much argumentation and speculative reasoning typical of the process of construction; but it disregards Connecticut law, which by its insistence upon a "clear and unambiguous directive" forbids the use of surmise as a substitute.

In an effort to dispel the doubt resulting from the codicil making the widow's share tax exempt, the Court of Appeals reasons that the will and codicil were jointly a single testamentary act which spoke as of the date when proration within the residue had become a definite problem. In substance it is saying that by reason of republication of the will, we must dis-

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[2] The New York law respecting tax apportionment is essentially the same as the law of Connecticut. *Matter of Huntington*, (App. Div. 1st Dept. — 1962) 14 A.D. 2d 312.

regard the historical development of the will and codicil in determining the testator's intent and indulge the fiction that the tax clause was written at the date of the codicil and determine the testator's intent as though that had been the fact. On this proposition turns the whole effort of the Court of Appeals to eliminate the doubt mentioned. If wrong its whole "construction" of Article One collapses. In stating this proposition, the Court of Appeals disregarded *Matter of Shubert, supra,* where the very same situation existed, but more importantly perhaps here, it ignored the only truly pertinent Connecticut authorities. The proposition stated is wholly wrong under Connecticut law. In *First National Bank* vs. *Baker,* (1938), 124 Conn. 577, 1 A.2d 283, the Supreme Court said at page 583:

> "• • • That the republication of the will in the codicil is in effect the making of a new will, with such changes in it as are contained in the codicil, as of the date of the codicil, has many times been held. • • • That does not mean, however, that in determining the construction of the instrument the development of the testamentary intent through the will and the codicils and the circumstances surrounding their execution are to be disregarded and the whole will read as though it were all originally made at the date of the codicil. 'From a will and its several codicils, like a statute with its later amendments, the maker's full intention is to be gathered.'"

After examining the will and codicil, the court concluded:

> "• • • The sole purpose of the last codicil was evidently to add a co-executor and there is no suggestion of an intent otherwise to change the provisions of the will or prior codicils. • • •"

See also: *Colt* vs. *Colt,* (1865), 32 Conn. 422, 447; *Griffith* vs. *Adams,* (1927), 106 Conn. 19.

Clearly a Connecticut court would read and understand the tax clause as originally written and then determine whether the codicil expressed an intention to change its effect. There is no sanction in the law of Connecticut for any other approach.

The Court of Appeals sought to buttress its conclusion about this matter by saying that in any event, that is, if the law was otherwise, the will would speak as of the date of death and at that time "proration was a problem to be guarded against." (R. p. 129a) The cases cited by the Court are inapposite and the court misconceives the meaning of rule and the law of Connecticut. This becomes abundantly plain if *Union & New Haven Trust Company* vs. *Sullivan*, 142 Conn. 685, the most recent of cases cited by the Court, be briefly considered. There, one of the questions reserved for the Supreme Court concerned the meaning and effect of a tax clause and whether it authorized the payment of certain federal estate taxes. It did not involve proration. The Supreme Court said at page 691:

> "The answers to these questions require that we find and effectuate John Moran's intent with respect to the payment of this tax. We look to the will as an entirety and examine the particular words and language used in the light of the circumstances under which they were written. *Chase National Bank* vs. *Guthrie*, 139 Conn. 178, 182, 90 A.2d 643. • • •"

A more recent statement of the same rule is found in *Connecticut Bank & Trust Company* vs. *Lyman*, (1961), 148 Conn. 273 where the Supreme Court said at page 278:

> "On the other hand, we cannot rewrite a will or a trust instrument. The expressed intent must control, although this is to be determined from reading the instrument as a whole in the light of the circumstances surrounding the

testator or settlor when the instrument was executed, including the condition of his estate, his relations to his family and beneficiaries, and their situation and condition. 'The construing court will put itself as far as possible in the position of the . . . (settlor), in the effort to construe . . . (any) uncertain language used by him in such a way as shall, conformably to the language, give force and effect to his intention.' *Hoops* vs. *Stephan*, 131 Conn. 138, 143, 38 A.2d 588. But '(t)he quest is to determine the meaning of what the . . . (settlor) said and not speculate upon what he meant to say.' *Chase National Bank* vs. *Guthrie*, 139 Conn. 178, 182, 90 A.2d 643; *First National Bank & Trust Co.* vs. *Parish of St. Thomas' Church*, 141 Conn. 489, 497, 107 A.2d 246."

The authorities cited in this section of the argument are not mentioned in the opinion of the Court of Appeals with the single exception of *Union & New Haven Trust Co.* vs. *Sullivan, supra*. The decision of the Court of Appeals is in conflict with all of them. Thus that court has decided several state questions in a way that is in conflict with state law. Its basic error was in deciding that the state apportionment statute may be made inoperative by something less than the specific and unambiguous directive the Connecticut Supreme Court requires. In the process of "construing" the will and codicil it reached conclusions as to the manner of doing it and the effect of republication of the will by the codicil that are also in conflict with the law of Connecticut.

The importance of these questions in the jurisprudence of Connecticut is obvious. When apportionment or the construction of a will is involved, substantial sums of money are generally at stake. But their usual importance is enhanced when they arise in a proceeding that may have a bearing on the assessment of federal taxes, for then their effect is wider and

heavier. It is imperative that a Probate Court have a stable body of state law with which to exercise the jurisdiction given to it over apportionment and to make the determinations of property rights affecting the assessment of federal estate taxes. This is evident if we look beneath the surface of this case. The Probate Court's decree apportioned estate taxes amounting to $3,832,550.45 wholly against the grandchildren's shares. (R. p. 39a) The decree which was passed after proper notice to all interested parties, including the Internal Revenue Service, cannot now be set aside and no appeal now lies from it. (See *Gill* vs. *Bromley*, 107 Conn. 281 and General Statutes of Connecticut, Sections 45-4, 45-288, 289.) The residue of the estate must be divided and distributed in conformity with it. Since the decree was passed, a deficiency in federal estate taxes was assessed for $1,333,194.45 and was paid and the Court of Appeals has ruled that no part of it is refundable. If the case were to end here, the matter of prorating the additional federal estate taxes paid would have to be submitted to the Probate Court. The latter might well be expected to adhere to its earlier decree. In such case, the additional taxes which are attributable solely to the Court of Appeals having a different concept of Connecticut law would be charged to the grandchildren. This would be a manifestly unfair result.

In Support of Reason (b)

There is a line of decisions of this court uniformly holding that an adjudication of property rights by a state court of competent jurisdiction has a binding effect when federal taxes are being computed. They are:

Uterhart vs. *United States*, (1916), 240 U.S. 598;
Freuler vs. *Helvering*, (1933), 291 U.S. 35;

Blair vs. *Commissioner of Internal Revenue*, (1937), 300 U.S. 5;
Riggs vs. *Del Drago*, (1942), 317 U.S. 95.

In the latter case this court said at pages 97 and 98 that Congress intended that the applicable state law as to the devolution of property should govern the ultimate impact of the federal estate tax.

The Connecticut proration statute manifestly affects the devolution of property and these property rights. The computation of the federal estate tax was a federal question the Court of Appeals was called upon to decide, but in doing so, it was required by decisions of this court to recognize the controlling effect of state law in determining the property rights involved. In failing to do that, the Court of Appeals decided a federal question in a way in conflict with the applicable decisions of this court which we have cited above.

In Support of Reason (c)

The second question which this petition presents for review is whether the probate decree requiring proration of estate taxes among the residuary shares is conclusive in assessing federal estate taxes. Both the District Court and the Court of Appeals held that it was not conclusive and that this was so, even if the probate proceedings were adversary and not collusive in character.

So much of the decision is in conflict with decisions of the Courts of Appeals in the Third, Fourth, Fifth, Sixth and Eighth Circuits in the cases cited below:

Gallagher vs. *Smith*, (C.A. 3, 1955), 223 F.2d 218;
Estate of E. V. Babcock vs. *Commissioner*, (C.A. 3, 1956); 234 F.2d 837;

Estate of I. G. Darlington vs. *Commissioner*, (C.A. 3, 1962), 302 F.2d 693;

Pitts vs. *Hamrick*, (C.A. 4, 1955), 228 F.2d 486;

United States vs. *Estate of Stephen F. Farish, Jr.*, (April 26, 1966 — C.A. 5, 5th);

Goodwin's Estate vs. *Commissioner*, (C.A. 6, 1953), 201 F.2d 576;

Eisenmenger vs. *Commissioner* (1944 — C.A. 8), 145 F.2d 103;

Estate of H. H. Peyton vs. *Commissioner*, (1963 — C.A. 8), 323 F.2d 438.

The view of the Third Circuit is made abundantly plain in its latest decision *Estate of I. G. Darlington* vs. *Commissioner, supra.* The decedent bequeathed half of his residuary estate to certain charities and the executors elected to treat the state inheritance taxes on these bequests as a deduction from the gross estate rather than as a credit against the tax in computing federal estate taxes. This is permissible under the Revenue Code if the resulting decrease in federal estate taxes inures only to the benefit of the charity. After appealing to the Tax Court from a deficiency asserted in federal estate taxes, the executors brought a petition in the Orphans' Court of the state, to determine whether the resulting decrease in federal estate taxes would inure solely to the benefit of the charities. At page 694, the Court of Appeals for the Third Circuit said:

> "Whether an adjudication by an appropriate state court of a question of state law on which federal tax consequences are made to turn is to settle that question in the administration of a decedent's estate has several times been before this Court. We have three times held that, if federal law makes federal tax treatment depend, without further qualifiaction, upon who has what rights in an es-

tate under state law, a state court's adjudication which is final in its effect upon those rights must also be taken as final as to the tax matters which depend upon those rights. See *Beecher* vs. *United States*, 280 F.2d 202 (3d Cir. 1960); *Estate of Babcock* vs. *Commissioner*, 234 F.2d 837 (3d Cir. 1956); *Gallagher* vs. *Smith*, 223 F.2d 218, esp. at 222-223 (3d Cir. 1955) (Maris, J., for the Court *en banc*).

We have also held squarely, in two of the three cases cited above, *Beecher* and *Gallagher*, that in order for the state court to settle conclusively the property question under state law and by that to fix the tax consequences under federal law, it is not necessary that the adjudication be the result of a contest in which one party says yes and another no. Other circuits have applied the same rule. *Eisenmenger* vs. *Commissioner*, 145 F.2d 103 (8th Cir. 1944); *Bullard* vs. *Commissioner*, 90 F.2d 144 (7th Cir. 1937), *rev'd* on other grounds *sub nom. Helvering* vs. *Bullard*, 303 U.S. 297, 58 S. Ct. 565, 82 L. Ed. 852 (1938). We have, of course, made allowances for collusive proceedings or 'consent decrees.' As is said by Judge Maris in *Gallagher* v. *Smith*, *supra*, 223 F.2d at 225: 'It is clear • • • that a state judgment obtained by collusion to defeat a federal tax need not be given conclusive effect in a suit in a federal court involving that tax.'

There is not the slightest indication of a collusive arrangement here. All parties were summoned; the matter was presented in open court at a regular session thereof. Because the petitioners' request did not develop into a fight between the parties interested in the estate does not make the adjudication any less conclusive. We think it pretty clear that if anybody changes his mind concerning the result reached in the state adjudication he will have a

bad time trying to avoid the effect of the Delaware County Orphans' Court's decision."

Pitts vs. *Hamrick, supra,* involved an intestate estate in South Carolina where there was no apportionment statute. One-third of the estate passed to the widow and two-thirds to children. The Probate Court in reliance only on equitable principles decided that the widow's third should be computed without deduction on account of estate taxes. The Supreme Court of South Carolina had not passed on the question. The Court of Appeals for the Fourth Circuit said *inter alia* at page 489:

"The question here is whether the one-third of the estate belonging to the widow after deduction of debts and expenses of administration, but without deduction of any portion of the federal estate tax, should be taken as a deduction under the statute, or whether the share of the widow to be deducted should first be diminished by a portion of the federal estate tax."

and at page 490:

"Whatever be the general law of South Carolina with respect to the matter, however, the decision of the probate court, which has not been appealed from, has settled the law, so far as this estate is concerned, and has vested in the widow her one-third free and clear of federal estate taxes. There is no showing that it was entered as a result of collusion or fraud or in a non adversary proceeding. Its effect was not merely to free the widow's share of responsibility for estate tax but to direct that this tax be paid from other shares. In other words, it fixed the amount of the widow's share of the estate; and whether this was done erroneously or in accordance with law, the amount of her share has been fixed thereby and the shares

of other distributees have been decreased accordingly. As the amount which the widow will thus receive does not exceed one-half of the adjusted gross estate, and as she receives it under the law of the state by decree of one of its courts, the estate is entitled to deduct it in computing the federal estate tax. Action of the probate court, even if erroneous, is valid unless reversed. * * *"

In *United States* vs. *Estate of Stephen P. Farish, Jr., supra,* a declaratory judgment, interpreting certain trust instruments, had been obtained in a Texan Court. This adjudication of property rights was held to be conclusive in a federal estate tax case by the Court of Appeals for the Fifth Circuit.

In *Goodwin's Estate* vs. *Commissioner, supra,* the Court of Appeals for the Sixth Circuit had before it an appeal from the Tax Court in a federal estate tax case. It turned on the validity of certain substantial claims filed by the three daughters of the decedent. The widow, the administratrix of the estate, thought the claims legitimate, but because of her circumstances moved the Probate Court to determine them. The claims were not actively opposed and the Probate Court allowed them. The Court of Appeals gave controlling effect to the decision of the Probate Court.

In *Eisenmenger* vs. *Commissioner, supra,* a Minnesota state court had construed a trust instrument and held that a beneficiary had no interest in certain dividends received by the trust. The Eighth Circuit held this adjudication of property rights to be binding on the Tax Court and itself in deciding the federal income tax liability of the beneficiary. In *Estate of H. H. Peyton* vs. *Commissioner, supra,* the Eighth Circuit again recognized the general principle but considered the probate court decision to have been obtained in a collusive proceeding.

CONCLUSION

It is respectfully submitted that this petition for a writ of certiorari should be granted.

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